STATE OF MICHIGAN

COURT OF APPEALS

In re G. ROGERS, Minor.

UNPUBLISHED
September 10, 2015

Nos. 326077; 326193
Jackson Circuit Court
Family Division
LC No. 11-002277-NA

Before: BORRELLO, P.J., and HOEKSTRA and O'CONNELL, JJ.

PER CURIAM.

Respondent-mother, J. Neeley, and respondent-father, D. Rogers, each appeal as of right the trial court's order terminating their parental right to their minor child under to MCL 712A.19b(3)(c)(*i*) (conditions that led to the adjudication continue to exist), (g) (failure to provide proper care or custody), and (j) (reasonable likelihood child will be harmed if returned to the parent's home). We affirm.

I. BACKGROUND FACTS

When the child involved in this case was born in February 2014, Neeley and Rogers were both incarcerated and had relinquished their parental rights to previous children. The Department of Health and Human Services (DHHS) petitioned the trial court to assume jurisdiction over the child because Neeley and Rogers were incarcerated on controlled substance offenses. Neeley was incarcerated for a lengthy period, but Rogers was shortly eligible for release.

In May 2014, the trial court held an adjudication hearing. At the hearing, Neeley admitted that the parties' home was raided in October 2013 and officers found drugs in the home. Rogers admitted that he had pleaded guilty to possession of a controlled substance. The trial court assumed jurisdiction over the child and ordered Neeley and Rogers to participate in substance abuse services, parenting classes, and social assessments. It also ordered Rogers to participate in a psychological evaluation and a substance abuse evaluation.

The child was placed with her step-great-uncle. Neeley indicated that she wanted the child to be placed with a different relative, preferably with the child's grandmother or siblings. The trial court asked Neeley to provide a list of people for it to consider for placement. The child's grandmother and the siblings' placement both refused placement. The trial court rejected the remainder of Neeley's suggested placements as non-relative placements.

At a review hearing in November 2014, Caitlin Young, the child's caseworker through Lutheran Social Services, opined that Rogers had made progress and completed a parenting class. Rogers sought parenting time. Young had concerns with Rogers's drug screens and urged that parenting time remain suspended until the results of a hair follicle test. Rogers admitted that he missed several screens but stated that they were on weekends when he lacked transportation.

At a review hearing in December 2014, Young testified that Rogers's hair follicle test was positive for cocaine and that Rogers had violated probation. The trial court found that Rogers had not made progress. It opined that Rogers was trying to "beat the system" and "deceive the Court." It ordered the child's permanency goal changed to adoption.

The trial court held a termination hearing in February 2015. At the hearing, Rogers testified that he was on probation stemming from the raid in October 2013, and that he had criminal drug convictions in 2001 and 2008. Robert Hasley, Rogers's probation officer, testified that Rogers had two probation violations—one for traveling to Chicago and one for the positive hair follicle test.

Rogers testified that he had never "dropped dirty for cocaine." He acknowledged that his hair tested positive, but contended that the agency tampered with the test. Julie Bornefeld, the office manager at Rogers's testing agency, testified that Rogers's hair follicle result was in the "very low detection amount" but was consistent with using cocaine more than once. Bornefeld testified that the test covered approximately 90 days, so Rogers's sample covered from at least mid-August to mid-November.

Brandye Croley, the child's case manager, testified that Young had offered parenting time to Rogers on four occasions but he did not take advantage of the offers. According to Croley, Rogers did not "get back" with them regarding parenting time. Rogers testified that Young had failed to contact him as many times as she claimed.

The trial court found that Rogers had not made progress on his services and had missed court appearances. It acknowledged that Young's reported face-to-face meetings most likely did not occur and that Rogers had problems with transportation. However, the trial court was concerned by the missing drug screens and Rogers's positive hair follicle test. It found that Rogers continued to engage in criminality and that the "criminality part of it" posed a risk of future harm to the child. Ultimately, the trial court terminated both parents' parental rights.

II. DOCKET NO. 326077

Neeley contends that the trial court violated her constitutional rights to care for her child by not allowing her to select a caretaker for the child while she was incarcerated. We disagree.

This Court reviews de novo issues of constitutional law. *In re Sanders*, 495 Mich 394, 403-404; 852 NW2d 524 (2014). A parent has a fundamental constitutional liberty interest in the care and custody of his or her children. *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982). A parent need not personally care for a child. *In re Mason*, 486 Mich 142, 161; 782 NW2d 747 (2010). A parent may voluntarily grant legal custody to his or her relatives while incarcerated. *Id*. at 163; *Sanders*, 495 Mich at 420-421.

In this case, Neeley attempted to direct the care of her children to the child's grandmother while she was incarcerated. However, the grandmother refused to care for the child. Rogers's ex-wife, with whom the child's siblings were placed, also refused to care for the child. Neeley was unable to identify any other relative willing to care for the child. While an incarcerated parent may voluntarily grant legal custody to his or her relatives while incarcerated, Neeley was unable to do so in this case because her relatives refused placement. The child was already placed with a relative, and the remainder of Neeley's choices were not relatives. Michigan law prefers placement with relatives during termination proceedings. MCL 722.954a; *In re COH*, 495 Mich 184, 195; 848 NW2d 107 (2014).

We conclude that the trial court did not violate Neeley's right to direct the care of her child. To the extent that Neeley raises a due process issue by briefly contending that placing the child in a home against her wishes was not fundamentally fair, we conclude that she has abandoned this issue because one brief sentence is not sufficient to develop an issue on appeal. See *VanderWerp v Plainfield Charter Twp*, 278 Mich App 624, 633; 752 NW2d 479 (2008).

III. DOCKET NO. 326193

A. STATUTORY GROUND MCL 712A.19b(3)(j)

Rogers contends that the trial court clearly erred when it made findings regarding the likelihood that a drug-dealing business in Rogers's home would expose the child to criminality because there was no such evidence at the termination hearing. We disagree.

This Court reviews for clear error the trial court's factual findings and ultimate determinations on the statutory grounds for termination. MCR 3.997(K); *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). The trial court's findings are clearly erroneous if we are definitely and firmly convinced that it has made a mistake. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

As an initial matter, we note that Rogers has only challenged the trial court's findings regarding MCL 712A.19b(3)(j), but the trial court also terminated Rogers's parental rights under MCL 712A.19b(3)(c)(*i*) and (g). Accordingly, even if we agreed with Rogers, any error in the trial court's findings regarding MCL 712A.19b(3)(j) would be harmless. See *In re Powers Minors*, 244 Mich App 111, 118; 624 NW2d 472 (2000). The trial court need only find that the petitioner has proven one statutory ground by clear and convincing evidence to terminate a parent's parental rights. *In re Olive/Metts*, 297 Mich App 35, 40; 823 NW2d 144 (2012). However, we will address this issue in the interests of clarity.

MCL 712A.19b(3)(j) provides that the trial court may terminate a parent's parental rights if it finds clear and convincing evidence that

> [t]here is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

A parent's failure to comply with his or her service plan is evidence that the parent will not be able to provide a child with proper care and custody and that the child may be harmed if returned to the parent's home. *In re White*, 303 Mich App 701, 710-711; 846 NW2d 61 (2014).

Rogers is incorrect that the trial court could only consider evidence presented at the termination hearing to support its findings. "The probate courts are to consider all hearings . . . as a single continuous proceeding. Therefore, evidence admitted at any one hearing is to be considered evidence in all subsequent hearings." *In re LaFlure*, 48 Mich App 377, 391; 210 NW2d 482 (1973). The court was entitled to consider evidence admitted at all the hearings in this case.

A fair reading of the finding that Rogers challenges on appeal indicates that it was concerned with the unknown effects that Rogers's continuing criminality would have on the child:

> You can get some crazy person that comes up to your house, maybe thinking you're still in the drug dealing business and if your daughter's there, I don't know what can happen. But based on everything that I'm familiar with, she could be in harms' way and it's going to be a long time, Mr. Rogers, before any court, I would think, could get a comfort level that that part of criminality is out of your life.

The evidence in this case included Neeley's admission that the parties' home was raided in October 2013 and officers found drugs and minors in the home and that Neeley's and Rogers's criminal histories included drug-dealing activities. Specifically, Neeley testified that she was incarcerated for delivering and manufacturing cocaine, and Rogers testified that he had lost his rights to previous children who came into care because he was dealing drugs. Neeley admitted that there were minors in the home during the raid that discovered the drugs. We conclude that the evidence supported the trial court's finding.

Additionally, Rogers failed to comply with his service plan, which provided an independent ground to support the trial court's termination decision. Rogers admitted that he had pleaded guilty to possession of a controlled substance. Rogers's criminality was a concern during the proceedings—Rogers had previous convictions in 2001 and 2008, and he twice violated his probation after his release from jail during the pendency of the proceedings. The trial court found that Rogers continued to use drugs, on the basis of his missed drug screens and cocaine found in his hair follicle. While Rogers offered alternative explanations for these circumstances, this Court will not re-assess the trial court's credibility findings. See *Miller*, 433 Mich at 337. The trial court clearly found that Rogers's explanations were not credible.

We conclude that the trial court did not clearly err by terminating Rogers's parental rights under MCL 712A.19b(3)(j). Given the evidence of Rogers's continued criminality, which included leaving minors in the presence of drugs, we are not definitely and firmly convinced that the trial court made a mistake when it found that his criminality posed possible harm to the child.

B. REASONABLE EFFORTS

Rogers contends that the trial court failed to make reasonable efforts to reunify him and the child. According to Rogers, the agency did not involve him in substance abuse treatment, did not have sufficient face-to-face contact with him, did not engage him in case planning, and failed to offer him parenting time. Rogers contends that these combined failings did not give him the opportunity to demonstrate that he could parent the child. We agree that the agency's services in this case were not perfect, but conclude that they were sufficient, and the trial court did not clearly err by finding that it made reasonable efforts.

We review for clear error the trial court's finding that an agency engaged in reasonable efforts to reunify the child with his or her parent. *Mason*, 486 Mich at 152. The trial court must make reasonable efforts to reunify a child with his or her parent unless aggravating circumstances are present. MCL 712A.19a(2). The purpose of a case service plan is to facilitate returning children to their parents. MCL 712A.18f(3); *Mason*, 486 Mich at 156. The trial court may not terminate a parent's parental rights on the basis of missing information that can be attributed to a lack of services offered to the parent. *Id*. at 159-160.

However, what efforts are reasonable depends on the circumstances of the case. When previous children have been removed from a parent's care, the trial court may consider past services and the parent's responses to those services to determine whether an agency engaged in reasonable efforts. See *In re Plump*, 294 Mich App 270, 271-272; 817 NW2d 119 (2011). Finally, "there exists a commensurate responsibility on the part of [parents] to participate in the services that are offered." *In re Frey*, 297 Mich App 242, 248; 824 NW2d 569 (2012).

In this case, Rogers testified that his previous children had come under the court's jurisdiction because he and Neeley were dealing drugs. Rogers testified that he had previously been offered services through Catholic Charities, a substance abuse evaluation, drug screens, counseling, and family reunification services. Rogers testified that he had not been able to successfully complete those services and he relinquished his rights to his previous children.

The case began in February 2014. Rogers testified that as part of his probation, he had in-patient rehabilitation that ended in August 2014. Rogers testified that his rehabilitation program was 90 days. Through August 2014, the trial court found that Rogers was not participating in drug screens had only completed parenting classes. Bornefeld testified that Rogers provided different information to different substance abuse evaluations, and she recommended that he participate in a group to help overcome substance abuse issues. In November 2014, Rogers participated in a hair follicle test. When the hair follicle results came back, they tested positive. Young testified that the test was consistent with multiple uses over a period of time and measured accurately within the last 90 days. In other words, the follicle test indicated that Rogers had used cocaine after his release from a residential treatment program.

Regarding visitation with the child, Rogers testified that the agency did not offer him visitation. Croley testified that the agency offered Rogers visitation on four occasions, and Rogers said that he would get back with them, but did not. The trial court was in the best position to resolve this credibility issue. See *Miller*, 433 Mich at 337.

Regarding Young's lack of face-to-face contact with Rogers, Rogers testified that two records were entirely false, another was actually a phone contact, and he had only received one

letter from Young instead of six. The first visit that Rogers claimed did not occur happened in October 2014. However, Rogers did not raise this as an issue until his termination hearing. A parent may not wait until the termination hearing to challenge the reasonableness of his or her services. *In re Terry*, 240 Mich App 14, 27; 610 NW2d 563 (2000). It simply does not give the trial court time to address the problem.

The trial court found that the agency's efforts were reasonable. Rogers had a history of failing to benefit from substance abuse services. He received in-patient substance abuse counseling during the pendency of this case and did not benefit from it. He offered an excuse for not testing that did not take into account that some of the days he missed testing for included weekdays. Rogers testified that the agency did not offer him visitation, but Croley testified that the agency did. The trial court took into account that Young's recording of face-to-face visits was inaccurate. We are not definitely and firmly convinced that the trial court made a mistake when it found that the services the agency provided Rogers were reasonable in this case.

We affirm.

/s/ Stephen L. Borrello
/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell